Times Herald Printing Company d/b/a Dallas Times Herald *and* Dallas Mailers Union No. 20 affiliated with Communications Workers of America, AFL–CIO *and* Dallas Typographical Union No. 173 affiliated with Communications Workers of America, AFL–CIO. Cases 16–CA–15433 and 16–CA–15433–2

November 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, DEVANEY, BROWNING, AND COHEN

The single issue presented in this case concerns the appropriate remedy for the Respondent's violation of its duty to bargain over the effects of its decision to close its business and terminate its employees. Specifically, we must decide whether the judge properly found that the payments the Respondent made to employees pursuant to the Worker Adjustment and Retraining Notification Act of 1988 (WARN), 29 U.S.C. § 2101 et seq., are an offset to the limited backpay remedy the Board traditionally provides for violations of this kind pursuant to *Transmarine Navigation Corp*., 170 NLRB 389 (1968). For the reasons set forth below, we find, contrary to the judge, that payments required by WARN may not be credited against payments required by the National Labor Relations Act.[1]

I. FACTUAL BACKGROUND

For many years, the Respondent has had a collective-bargaining relationship with Dallas Typographical Union No. 173, the representative of the Respondent's composing room employees, and with Dallas Mailers Union No. 20, the representative of the Respondent's mailroom employees. The most recent collective-bargaining agreements between the Respondent and the Unions expired on August 31 and September 11, 1990. The Respondent began negotiations with each Union prior to the expiration of the collective-bargaining agreements, and the negotiations continued into December 1991.[2] During this period of negotiations, rumors that the Respondent was considering closing its operations appeared in newspaper articles and elsewhere. The Respondent repeatedly denied the rumors to the Unions.

On December 9 the Unions received letters from the Respondent stating the following:

> In compliance with the Federal Worker Adjustment and Retraining Notification Act (''WARN'') . . . this is to notify you that on December 9, 1991, The Times Herald Printing Company (''Newspaper'') . . . effective this date, has permanently ceased operations.
>
> . . . .
>
> As a result of the decision to sell substantially all of the assets of the Newspaper and to go out of business permanently, employment of all employees represented by your union is terminated as of today.
>
> . . . .
>
> Although not required by WARN, the Newspaper will provide the employees whose names appear on the attached list 60 days pay and benefits . . . If you wish to meet and bargain about the effects of this decision on the employees represented by your Union, please contact Mary Trossen.

On December 10 the Unions requested to meet and bargain with the Respondent over the effects of its decision to close.

The parties held their only bargaining session on January 6, 1992. At the session, the Unions presented the Respondent with proposals on several subjects. The parties did not reach agreement on any of the subjects. The Unions accepted a counterproposal suggested by the Respondent's negotiators concerning sick pay, but on such acceptance the Respondent's negotiators stated that they did not have the authority to make any proposals and could only report the proposal to management.

II. THE JUDGE'S DECISION

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by closing its business and terminating its employees without giving the Unions adequate notice and a reasonable opportunity to bargain over the effects of its decision to close. The judge found that, during the year before the announcement, the Respondent actively misled the Unions into believing that the rumors about the closing were false and told them nothing about the closing until presenting them with a fait accompli on the day the sale of assets was finalized and the business closed. The judge concluded that the Respondent's deliberate failure to give the Unions adequate notice deprived the Unions of the opportunity, at a meaningful time, to engage in bargaining over the effects of its decision to close.[3]

Notwithstanding his finding that the Respondent violated its effects bargaining obligation, the judge concluded that the customary *Transmarine* backpay remedy was not warranted in the instant case. Specifically, the judge found that the Respondent had already paid its employees 60 days' wages and benefits to avoid a lawsuit under WARN.[4] In general, that statute requires

[1] On September 3, 1992, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel and the Charging Parties filed exceptions and supporting briefs.

[2] All dates hereafter are in 1991 unless otherwise stated.

[3] No exceptions were filed to these findings.

[4] Although the Unions contended that the Respondent paid its employees the equivalent of only 42.9 days' pay, the judge found that for the purposes of this case it was not necessary to determine

employers who employ over 100 employees to give 60 days' advance notice of a plant closing, and it makes the employer liable for backpay for each day the employer failed to give such notice.[5] The judge further found that WARN payments are a form of severance pay, that severance pay is an offset to a Board backpay award, and thus any backpay ordered under a *Transmarine* remedy would be offset by the Respondent's WARN payments to employees. Because, in the judge's view, both *Transmarine* and WARN remedy the same misconduct and WARN payments would likely fully offset any backpay due under *Transmarine*, the judge concluded that any further Board-ordered remedy would result in a windfall to the Respondent's employees. Having found that the *Transmarine* remedy was not required, the judge concluded that a notice to employees was not necessary and recommended that the complaint be dismissed.

In their exceptions, the General Counsel and Charging Parties contend, inter alia, that the judge erred in finding that the limited *Transmarine* backpay remedy is offset by the Respondent's WARN payments. We agree.

III. DISCUSSION

The Board's power to devise and to compute monetary remedies is broad. ''As with the Board's other remedies, the power to order back pay is for the Board to wield, not for the courts.'' *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). ''When the Board, in the exercise of its informed discretion, makes an order of restoration by way of back pay, the order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'' *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346–347 (1953). See *Gullet Gin Co. v. NLRB*, 340 U.S. 361 (1951) (Board has the discretion to refuse to deduct unemployment compensation payments from backpay).

When an employer has violated its statutory obligation to bargain over the effects of its decision to cease operations, the Board customarily imposes a *Transmarine* remedy requiring generally that the employer bargain over the effects of its decision and provide backpay from 5 days after the date of the Board's decision until the occurrence of one of four specified conditions. 170 NLRB at 390.[6] In a subsequent decision, the Board held that severance pay received by employees is a proper deduction from the the amount of backpay due them under a *Transmarine* remedy. *W. R. Grace & Co.*, 247 NLRB 698, 699 fn. 5 (1980). The burden of establishing that a particular payment qualifies as a deduction from gross backpay lies with the employer. See, e.g., *NLRB v. S. E. Nichols of Ohio*, 704 F.2d 921, 924 (6th Cir. 1983).

Applying these principles here, we must decide whether the Respondent has satisfied its burden of showing that its payments to employees constitute a proper deduction from the backpay that would otherwise be due under *Transmarine* to remedy the Respondent's violation of the Act. There is an initial question regarding the nature and purpose of the Respondent's payments: Were they severance payments or WARN payments? In this connection, the judge noted that there was an inconsistency in the Respondent's December letter to the Unions because the Respondent stated that it was acting ''in compliance with WARN,'' yet denied that the payments were ''required by WARN.'' However, the judge proceeded to find that ''the payments which Respondent made were an effort to avoid a suit under WARN,'' and he subsequently referred to them as ''WARN payments.'' The Respondent has not excepted to this finding, and we therefore adopt it in accordance with our usual practice. *Anniston Yarn Mills*, 103 NLRB 1495 (1953). (''It is the Board's practice to adopt, as a matter of

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whether the payments constituted 42.9 days' pay, or 60 days' pay as the Respondent contended. For convenience, the judge referred to the payment as 60 days' pay. In light of our decision below, we too find that for the purpose of this case it is not necessary to determine whether the Respondent paid its employees 42.9 or 60 days' pay, and shall for convenience refer to it as 60 days' pay.

[5] Sec. 3(a)(1) of WARN, 29 U.S.C. § 2102, states:

> An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—
>
> (1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee[.]

Sec. 5(a)(1) of WARN, 29 U.S.C. § 2104, states:

> Any employer who orders a plant closing or mass layoff in violation of section 3 of this Act shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—
>
> (A) back pay for each day of violation at a rate of compensation no less than the higher of—
>
> (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or
>
> (ii) the final regular rate received by such employee; and
>
> (B) benefits under an employee benefit plan described in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)), including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

[6] The four conditions are as follows: (1) the date the employer bargains to agreement with the union; (2) a bona fide impasse in bargaining; (3) the failure of the union to request bargaining within 5 days of the Board's decision or to commence negotiations within 5 days of the employer's notice of its desire to bargain; or (4) the subsequent failure of the union to bargain in good faith.

course, findings . . . to which no exceptions are filed.'')[7]

Having determined that the payments in question are properly classified as WARN payments, we now turn to the issue whether such payments are deductible from a *Transmarine* backpay award. For the following reasons, we find, contrary to the judge, that payments to employees made pursuant to WARN are not an offset to the backpay due under *Transmarine*. In reaching this conclusion, we rely primarily on the plain language of the WARN statute itself. Section 6 of WARN, 29 U.S.C. § 2105, states as follows:

> The rights and remedies provided to employees by this Act are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this Act shall run concurrently with any period of notification required by contract or by any other statute.

Thus, the explicit language of the statute makes clear that the Respondent's remedial obligations under WARN ''are in addition to, and not in lieu of,'' the Respondent's remedial obligations under the NLRA, and that WARN remedies ''do not alter or affect'' NLRA remedies. It is difficult to conceive how Congress could have made its intent any plainer: WARN payments do not offset payments required by other Federal labor laws, such as the NLRA.[8] There is nothing to the contrary in the WARN statute or its legislative history.

Consistent with this interpretation, Section 5(a)(2)(B) of WARN, 29 U.S.C. § 2104(a)(2)(B), provides that an employer's WARN liability may be reduced by any voluntary and unconditional payment to an employee ''that is not required by any legal obligation.'' Backpay paid to an employee pursuant to a Board Order would, of course, constitute a payment ''required by [a] legal obligation.'' Thus, amounts paid pursuant to a *Transmarine* remedy would not reduce an employer's liability under WARN. In sum, there is an apparent symmetry in the WARN statute: under Section 6, WARN payments do not offset *Transmarine* payments, and under Section 5(a)(2)(B), *Transmarine* payments do not offset WARN payments.

Because amounts due employees under WARN are ''in addition to'' amounts due under the NLRA, the judge erred in finding that a Board remedy in the instant case would result in a ''windfall'' to employees. On the contrary, both WARN payments and *Transmarine* payments are necessary if the status quo ante is to be restored and the Respondent's employees are to be made whole for the losses they incurred. The WARN payments remedy the Respondent's violation of its obligation to give advance notice of its decision to cease operations. The *Transmarine* payments remedy the Respondent's violation of its obligation to allow for meaningful bargaining over the effects of its decision to cease operations. Under the judge's decision, the employees are compensated for the notice violation, but they receive nothing for the effects bargaining violation. This loss is significant because effects bargaining can result in such additional benefits as pension fund payments, health insurance coverage and conversion rights, preferential hiring at other employer plants, and reference letters for jobs with other employers. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981). Unless an effective *Transmarine* remedy is imposed, the status quo ante with respect to bargaining power will not be restored and the employees' chance to negotiate for these significant benefits will be unlawfully minimized.

For all these reasons, we conclude, contrary to the judge, that the Respondent's WARN payments do not ''serve as an offset to'' or ''eliminate the need for'' the *Transmarine* limited backpay remedy the Board customarily issues in cases of this kind.

THE REMEDY

As the Respondent has violated Section 8(a)(5) and (1) of the Act by failing to provide the Unions with a reasonable opportunity to bargain over the effects of its decision to close, and as the Respondent's WARN payments neither offset nor eliminate the need for the limited *Transmarine* backpay remedy, we shall order the Respondent to bargain with the Unions concerning the effects of its decision to close and pay backpay to employees in the manner provided for in *Transmarine*. Thus, the Respondent shall be required to pay its terminated composing room employees and mailroom employees at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Unions on those subjects pertaining to the effects on employees of

[7] The Respondent's payments to employees were WARN payments, and not severance payments. Therefore, unlike our concurring colleague, we see nothing in the instant case requiring reconsideration of *W. R. Grace*, which represents existing law governing severance payments. In our view, it is preferable to address an issue in a case in which it is squarely raised, when all the affected parties have had an opportunity to brief it. Chairman Gould notes that he has discussed the issue of deductions from backpay awards in *Japan's Reshaping of American Labor Law*, pp. 71–81 (1984). For the reasons stated in her further concurrence, Member Browning would overrule *W. R. Grace*.

[8] In our view, the judge erred in reading the general rule too narrowly and placing too much emphasis on the ''except'' clause. The language on which the judge relied merely provides that the 60-day WARN ''period of notification . . . shall run concurrently with any period of notification required by contract or by any other statute.'' Contrary to the judge, we find no ''implication'' in this language that monetary WARN remedies displace NLRA remedies.

its decision to close; (2) a bona fide impasse in bargaining; (3) the Unions' failure to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Unions; (4) the Unions' subsequent failure to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount they would have earned as wages from December 9, 1991, the day the Respondent terminated its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall the sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be computed with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[9] We shall also provide for mail notices to employees.

ORDER

The National Labor Relations Board orders that the Respondent, Times Herald Printing Company, d/b/a Dallas Times Herald, Dallas, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to give the Unions, Dallas Mailers Union No. 20, affiliated with Communications Workers of America, AFL–CIO and Dallas Typographical Union No. 173, affiliated with Communications Workers of America, AFL–CIO, a reasonable opportunity to bargain over the effects on employees of its decision to cease operations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Unions with respect to the effects on employees of its decision to close its business, and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Pay its former composing room employees and mailroom employees terminated by the Respondent when it ceased operations in December 1991 their normal wages for the period and in the manner set forth in the remedy section of this Decision and Order.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail to the Unions and to each of its composing room employees and mailroom employees who were employed by the Respondent at the time it ceased operations an exact copy of the attached notice to employees marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 16, after being duly signed by the Respondent's authorized representative, shall be mailed immediately upon receipt as directed.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER BROWNING, further concurring.

I join the majority's decision finding that payments made by the Respondent pursuant to the Worker Adjustment and Retraining Notification Act (WARN) are not a proper deduction from the amount of backpay due under the limited backpay remedy of *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). I write separately, however, because I believe that resolution of the instant remedial issue requires, in addition to the majority's WARN analysis, further consideration of the unique purpose of *Transmarine's* limited backpay remedy. Specifically, I would find that when the Respondent's payments are considered in light of the purpose of *Transmarine*, such payments, regardless of whether they are considered WARN payments or severance payments, are not a proper offset to *Transmarine* backpay.

The purpose of the limited backpay component of the *Transmarine* remedy differs significantly from that of the Board's usual backpay remedy. Whereas that remedy is designed to make employees whole for wages and benefits lost as a result of the unlawful conduct,[1] the *Transmarine* backpay remedy—which accompanies an order requiring bargaining over effects of a decision to cease operations—is ''designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent.'' *Transmarine*, supra at 390. In a subsequent case, the Board stated that restoring the union's bargaining strength is the more important objective. *O. L. Willis, Inc.*, 278 NLRB 203, 205 (1986).

Similarly, the courts have recognized that the primary purpose of the *Transmarine* remedy is ''to create

[9] We do not pass on the judge's speculation and implicit findings concerning the amount of backpay at issue here under the *Transmarine* formula. In accordance with our traditional practice, we leave this matter to the compliance stage of these proceedings.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] *Sheller-Globe Corp.*, 296 NLRB 116 (1989).

an incentive for the Company to bargain in good faith.'' *Nathan Yorke v. NLRB*, 709 F.2d 1138, 1145 (7th Cir. 1983). In *Yorke*, the court upheld the Board's authority to grant such a remedy, stating: ''Ensuring meaningful bargaining comports with the primary objective of the Act.'' Id. Accord: *NLRB v. Emsing's Supermarket*, 872 F.2d 1279 (7th Cir. 1989). See also *First National Maintenance Corp*. v. NLRB, 452 U.S. 666, 681–682 (1981) (''[U]nder Section 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy.'')

In contrast, the purpose of a make-whole remedy in cases of discrimination in violation of Section 8(a)(3) and (1) of the Act is ''to effect 'a restoration of the situation, as nearly as possible, to that which would have obtained but for illegal discrimination.''' *New England Tank Industries*, 147 NLRB 598, 599 (1964), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Accordingly, the Board has long held that severance payments are a proper offset to a backpay remedy in cases of illegal discrimination. The reasons for this offset, however, are directly related to the purposes of the backpay remedy. As stated by the Board in *Fibreboard Paper Products Corp*., 180 NLRB 142, 146 (1969), enfd. sub nom *United Steelworkers v. NLRB*, 436 F.2d 908 (D.C. Cir. 1970), cert. denied 403 U.S. 905 (1971): ''the purpose behind a backpay order is to make an employee 'whole'; it is not to enrich him by ordering the Respondent to pay twice. The rationale for deducting severance payments from backpay in the normal case is that they are in lieu of, or similar to, wages and allowing the employee to have backpay plus the severance allowance would make him more than 'whole.'''

This rationale for deducting severance payments from make-whole remedies is inapplicable to, and indeed inconsistent with, the *Transmarine* goal of restoring the union's bargaining leverage. That leverage is created by essentially putting the employees back on the payroll while effects bargaining takes place, so that the employer has an incentive to reach agreement (or a legitimate impasse) in order to stop the running of its financial obligation. To start the effects bargaining with a ''credit'' to the employer in the amount of severance payments it made (often long ago) postpones pro tanto the point at which bargaining will in any sense be driven by the employer's desire to terminate its *Transmarine* payments to the employees. Any deduction of prior severance payments will dilute the union's bargaining leverage below the level anticipated by *Transmarine* and may reduce the remedy to little more than an order requiring effects bargaining with a union that is ''devoid of all economic strength.'' *Transmarine*, supra, citing *Royal Plating & Polishing Co*., 160 NLRB 990, 997 (1966). It is precisely this type of pro forma bargaining that the *Transmarine* remedy is intended to prevent.

Furthermore, severance payments previously made by an employer subject to a *Transmarine* remedy are quite likely to have been only those due under the labor agreement in effect prior to the employer's decision to close its operation. To credit them against the *Transmarine* payments effectively requires the union to *re*-negotiate them in the effects bargaining merely to achieve the status quo ante which *Transmarine* seeks to restore as the union's right. It is well established that the duty to bargain over the effects of a decision to terminate a business includes the duty to bargain over such benefits as severance pay. *NLRB v. Royal Plating & Polishing Co*., 350 F.2d 191, 196 (3d Cir. 1965). While a union may not always be able to achieve an increase in previously negotiated severance benefits, those benefits should at least set the level at which effects bargaining begins, as is the case when an employer fulfills its effects bargaining obligation voluntarily without the coercion of an unfair labor practice charge. An employer that disregards its duty to bargain should not be rewarded for its own misconduct by receiving a credit against *Transmarine* payments for compensation that it was required to pay by contract. Even in the unlikely event that extra-contractual severance payments were made voluntarily, that unilateral action would still derogate the employer's bargaining obligation, and crediting the payments against a subsequent *Transmarine* remedy would reward the wrongdoer for its additional misconduct by diminishing the efficacy of the remedy.

Therefore, I would find that even in circumstances where WARN is not implicated, an employer's final payments to employees generally should not serve as an offset to *Transmarine* backpay. In so finding, I would overrule *W. R. Grace & Co*., 247 NLRB 698, 699 fn. 5 (1980), to the extent that it holds severance pay received by employees to be a proper deduction from the amount of backpay due under the limited backpay component of a *Transmarine* remedy.[2]

For two reasons, I believe that the Board should overrule *W. R. Grace* today and not wait for a future case in which the question is more directly presented. First, I expect that such a future case may be difficult

[2] The relevant part of *W. R. Grace* consists essentially of the following one sentence of rationale: ''Severance pay is properly considered as interim earnings.'' The two cases cited for this proposition date back to 1939, almost 30 years before *Transmarine* was decided, and both involve the usual make-whole remedy for employees discriminatorily discharged. *Southern Colorado Power Co*., 13 NLRB 699, 718 (1939); *Press Co*., 13 NLRB 630, 648 (1939). As I have explained above, the rationale for those cases does not apply to a *Transmarine* remedy, which has entirely different purposes. In addition, I note that *W. R. Grace* does not represent well-established Board precedent, because it has not been cited on the severance pay issue in any subsequent *Transmarine* case.

to identify, and that this case, by comparison, reaches us in an unusually clear posture. As my colleagues have noted, the Respondent's failure to except to the judge's finding that its payments to employees were ''WARN payments'' has greatly simplified our decisional task. In future cases, the nature and purpose of the employer payments are likely to be disputed and much more difficult to discern.

Second, the question of the continued validity of *W. R. Grace*, in light of today's decision, leaves Board law in a highly anomalous state. Employers are now on notice that WARN payments, unlike severance payments, are not a proper deduction from the amount of backpay due under *Transmarine*. Therefore, so long as *W. R. Grace* remains Board law, employers about to terminate operations will have an incentive to ignore the union and unilaterally make final payments to employees labeled as ''severance payments'' rather than ''WARN payments.'' In this way, an employer could flout its duty to bargain over effects, secure in the knowledge that if charged with a violation of the NLRA, under *W. R. Grace* its ''severance payments'' will offset backpay due the employees under *Transmarine*. In my view, the law should not encourage such semantic manipulation of form over substance. Board remedies should effectuate the policies of the Act, not embolden parties to disobey its specific commands.

Accordingly, I would find that, in addition to the reasons stated by the majority, the limited *Transmarine* backpay remedy cannot be offset by the Respondent's payments to employees, because the full amount of backpay due under the *Transmarine* formula is necessary to ensure that meaningful effects bargaining will occur as contemplated by the Act.

APPENDIX

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to give the Unions, Dallas Mailers Union No. 20, affiliated with Communications Workers of America, AFL–CIO and Dallas Typographical Union No. 173, affiliated with Communications Workers of America, AFL–CIO, a reasonable opportunity to bargain over the effects on employees of our decision to close our business.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL, on request, bargain with the Unions with respect to the effects on employees of our decision to close our business, and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL pay our former composing room employees and our former mailroom employees their normal wages for a period specified by the National Labor Relations Board, plus interest.

TIMES HERALD PRINTING COMPANY
D/B/A DALLAS TIMES HERALD

J. O. Dodson, for the General Counsel.
Billy J. Austin, Vice President, Communications Workers of America, AFL–CIO, of Englewood, Colorado, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Fort Worth, Texas, on June 11, 1992, on a consolidated complaint issued by the Regional Director for Region 16 of the National Labor Relations Board on April 29, 1992. The consolidated complaint is based on charges filed by Dallas Mailers Union Local No. 20 (the Mailers) and Dallas Typographical Union Local No. 173 (the Printers) (together called the Unions) on February 26 and March 23, 1992. It alleges that Times Herald Printing Company d/b/a Dallas Times Herald (Respondent) has committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act or the NLRA).

Issues

The principal issue is whether Respondent's closing its business without notice to the Unions, who are the 9(a) representatives of Respondent's employees in two separate bargaining units, violated the Act's duty to bargain in good faith over the effects such a closing would have on the employees. Connected to that is the appropriate remedy which should be imposed. Counsel for the General Counsel seeks a limited backpay order under the authority of *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). Nonetheless, certain facts are present which suggest that no remedy should be imposed for policy reasons because the violation cannot realistically be further remedied.

A second issue is whether the General Counsel has proven Respondent unlawfully failed to provide certain of its employees with the correct amount of vacation pay owed them at the time it closed its business.

Although, as noted, Respondent filed an answer denying that it had committed any unfair labor practices, it did not appear at the hearing to defend itself. Its attorney of record, Neil Martin of the Houston law firm of Fulbright & Jaworski, did participate in a telephone conference prior to the hearing. During that conference he advised that his client would not authorize an appearance. He did cooperate with the General Counsel to the extent of discussing a modification to the complaint and changing the answer to admit the modified allegation. (See G.C. Exh. 2.) That, however, was the extent of Respondent's participation.

Nonetheless, the parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Only counsel for the General Counsel filed a brief; it has been carefully considered. Based on the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Texas corporation, has published a daily newspaper in Dallas. It admits that during the 12 months preceding December 9, 1991, in the conduct of its business operations it had gross annual revenues in excess of $200,000 and during the same period it purchased and received at its Dallas facility goods, supplies, and materials valued in excess of $50,000 directly from suppliers outside Texas. Accordingly, Respondent admits and I find that prior to December 9, 1991, it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

Respondent has had a collective-bargaining relationship with both Unions for many years. The most recent contract with the Printers had expired on August 31, 1990, and covered a bargaining unit of composing room employees. Similarly, the most recent contract with the Mailers, covering mailroom employees, had expired on September 11, 1990.

Bargaining with both Unions had been ongoing since before those contracts had ended; nonetheless, the parties continued to abide by their terms. Indeed, bargaining was underway as late as December 5, 1991, the 34th negotiation session between the Printers and Respondent. Likewise, bargaining with the Mailers had been extensive. Their last session had been October 22, 1991, and had consisted of 19 or more meetings.

Suzye Marino, the president of the Printers, was that Union's chief negotiator. Representing Respondent during most of the meetings were Gene Janski, vice president of operations, Mary Trossen, human resource director, and Gene Harris, manager of the composing room. Marino testified that at no time during any of these meetings had any of Respondent's negotiators even intimated that Respondent was in any danger of going out of business and shutting down its operations. To the contrary, she remembers that in June, after a local weekly newspaper had printed an article describing rumors that Respondent was either shutting down or filing for Chapter 11 bankruptcy, Janski and others strongly replied to her questions about it, saying the rumors were false.

In July a second article appeared in the same weekly, again repeating similar rumors. At the July 23 negotiation session, Respondent's officials again denied them, saying to Marino that they couldn't seem to stop the gossip, but the reports were, nonetheless, untrue.

The Mailers' president, John Zimmerman, like Marino, testified that at no time during any bargaining meeting did any official of Respondent ever suggest to him or his people that the Company would either cease business or be sold.

On Sunday, December 8, 1991, both Marino and Zimmerman learned from the local television news that Respondent had announced it was quitting business that day. On Monday, December 9, Marino hand-delivered a letter to Janski asserting that the decision to close so precipitously had not given the Printers an opportunity to bargain over the effects of the decision and asserted that Respondent had left it no choice but to file unfair labor practice charges.

On her return home from delivering that message, she found a letter from Respondent's executive vice president, Glenn M. Ford, which had been left on her front door. An identical letter was hand-delivered to Zimmerman that day as well. Dated December 8, it stated, in pertinent part:

> In compliance with the Federal Worker Adjustment and Retraining Notification Act [of 1988] (''WARN''), 29 U.S.C. § 2101, et seq., this is to notify you that on December 9, 1991, The Times Herald Printing Company (''Newspaper'') . . . effective this date, has permanently ceased operations.[1]
>
> All Newspaper publishing and distribution activity at [both our facilities] have been permanently discontinued and the Newspaper is to be closed.
>
> As a result of the decision to sell substantially all of the assets of the Newspaper and to go out of business permanently, employment of all employees represented by your Union is terminated as of today.
>
> [Reference to list of affected employees attached to letters].
>
> *Although not required by WARN, the Newspaper will provide the employees whose names appear on the attached list 60 days pay and benefits.* If you wish further information concerning this notice, contact Mary Trossen at [telephone number]. If you wish to meet and bargain about the effects of this decision on the employees represented by your Union, please contact Mary Trossen. [Emphasis added.][2]

[1] The statute to which the letter refers requires employers who employ over 100 employees, absent certain special situations, to give them or their representative 60 days' notice in the event of a plant closing affecting 50 or more employees. See 29 U.S.C. § 2102(a)(1). The WARN Act is discussed further, infra.

[2] Also on Monday, December 9, the Dallas Morning News, purchaser of Respondent's assets, published what it said was a statement by Respondent's publisher, John Buzzetta, dated the previous day:

> The Dallas Times Herald today announced that it is selling substantially all of its assets to the A.H. Belo Corporation, publisher of the Dallas Morning News, for $55 million. The Dallas Times Herald will publish its last edition tomorrow.
>
> The companies are also settling all outstanding litigation.
>
> The Times Herald Printing Company, publisher of the Dallas Times Herald, said that all its 900 full time employees would be offered salary and benefits for 60 days. A proportionate offer is being made to qualifying part time employees. Additional compensation is being offered to long time employees.
>
> ''This action was inevitable,'' said John Buzzetta, publisher of the Times Herald. ''In the last year we approached more than 100 potential investors or buyers for this newspaper. These efforts were not successful.''
>
> The transaction with A.H. Belo Corporation was reviewed by the U.S. Department of Justice.

Because of the gravity of the closure, it became a widely disseminated news story. Billy J. Austin, a vice president of the Communications Workers of America, AFL–CIO, heard about the closure via television at his home in Englewood, Colorado. Almost immediately thereafter, both Marino and Zimmerman notified him as well. He directed that they immediately seek to negotiate over the effects of the closure.

Marino responded on behalf of both Unions by hand-delivered letter dated December 10. She asked Respondent to meet and bargain regarding the following subjects: (1) severance pay, (2) vacation pay, (3) sick day payments, (4) pension funding, (5) job retraining, (6) job replacement, and (7) continuation of group health insurance.

After an exchange of correspondence, in which Respondent's Trossen said the Company recognized its obligation to meet and bargain over the effects of the asset sale, a meeting was scheduled and held on January 6, 1992.

The two Unions, with Austin's assistance, met on January 5 to prepare their demands. On January 6 all three union officials, together with some other local officers, met with Trossen and Attorney Martin. The lists which the two Unions had prepared, identical, were presented to Trossen and Martin by Austin.

They were more extensive than the list which Marino had described in her December 10 letter. In its entirety the list of demands is:

> 1. SEVERANCE PAY—One (1) week's pay for each year of service, up to a maximum of 40 weeks pay.
>
> 2. VACATION PAY—All unused vacation pay to include vacation pay on the days paid under the WARN Act.
>
> 3. PENSION CONTRIBUTIONS—All pension contributions shall be made on all monies paid.
>
> 4. SICK PAY—Six (6) days pay of sick pay, if unused by the employee.
>
> 5. JOB RETRAINING—An amount equal to 6% of the sale price of the newspaper is to be placed in a fund, to be jointly administered by an equal number of union and management representatives to provide job retraining in courses paid for and subsidizing of [pay] [sic] while attending schools agreed to by the committee.
>
> 6. HEALTH CARE—The employer shall continue the health care program as required under COBRA by making the payments as provided by contract.
>
> 7. LIFE INSURANCE—The company shall provide life insurance equal to the yearly wage of the employee which shall be double in case of accidental death and shall include dismemberment insurance. This insurance is to continue until Jan. 1, 1994.
>
> 8. HOLIDAYS—Any holidays occurring within the 60-day WARN period shall be paid at double time as though they were worked, including employee birthday holidays.[3]

Austin was the only witness to testify about the meeting. He said the Company took the proposals under advisement, caucused, responded and made a counterproposal on sick pay. He remembered the Unions accepted the counterproposal, but that almost immediately Martin said he hadn't the power to make the proposal; that he could only report on it to his principals.

With respect to vacation pay, it appears that they discussed discrepancies claimed by some of the employees. Martin told Austin that Trossen would continue to be employed by Respondent until the end of February, and during that time, any discrepancies could be ''adjudicated and settled'' through her. He said he understands, but evidently does not know, that later Trossen referred some of those to the bookkeeper. Apparently they were not resolved to the employees' satisfaction.

Zimmerman, whose Mailers bargaining unit consists of 140 employees, provided a list of 9 individuals[4] who claim they were not paid the full amount of unused vacation pay. A 10th employee, John Holly, was in the Printers bargaining unit which, according to a posthearing submission by the General Counsel, was composed of 53 employees.

Zimmerman acknowledges, and Marino seems to concur, that Respondent had paid all its employees vacation pay, including these 10. Presumably these payments were in accordance with the formulae set forth in the two respective collective-bargaining agreements. Certainly counsel for the General Counsel has not contended that Respondent totally repudiated that benefit. He only asserts that these 10 should have been paid as they claim. Thus, it seems that 183 of 193 employees, or 95 percent, were paid properly; the complaint is directed only to the 5 percent who claim the vacation payments were too low.

Curiously, however, there is no evidence, aside from Zimmerman and Marino's hearsay testimony and an equally hearsay list of lost hours (G.C. Exh. 18) prepared by Zimmerman, that these 10 are owed anything. Indeed, there is no evidence that anyone has filed a grievance or demanded that Respondent bargain over the matter. Therefore, Respondent has not received any claims to reject. It is clear to me that Respondent, by paying all of its employees the vacation benefits to which it believed them entitled, has honored the vacation pay plans. The only dispute raised by these 10 employees is whether the benefit amounts have been correctly calculated, not whether the benefit itself has been renounced.

With respect to further bargaining on January 6, Austin simply testified that he did not regard the meeting to have come to an impasse. There is no testimony regarding how matters were left; whether the parties agreed to meet again or whether Martin reported having met with his principals re-

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''This recession has been especially difficult for media companies and particularly hard on the second newspaper in a market,'' Buzzetta said. ''Through it all, however, thanks to a wonderful and very talented group of employees we have continued to publish a very high quality newspaper.

The Times Herald said it does not anticipate a bankruptcy filing and that it expects to pay all its suppliers.

[3] In addition to the substantive demands listed above, the Unions also demanded a copy of the employee list which they said was missing from the December 8 letter, as well as a copy of the sales agreement.

[4] The nine are: Ruth Collins, Alex Massicci, Larry McCord, Boyd McClure, Robin Moss, Maria Ortega, John White, Patricia Smith, and Ramona Salazar. The last two had been off work because of industrial injuries.

garding the sick leave proposal or what, if any, their response was.

As noted, shortly before the hearing, I conducted a telephone conference with all counsel. During that conversation, and later at the hearing, there seemed to be a general consensus that Respondent had indeed paid the 60 days' pay and health benefits which it had promised in its December 8 letters. However, in reviewing the record, that seemingly undisputed fact could not be found. I therefore wrote the parties a letter dealing with that question. My letter is attached as Appendix A; counsel for the General Counsel's response is Appendix B; the Charging Party's response is Appendix C; and Respondent's response is Appendix D.

From the correspondence it is apparent that the General Counsel and the Unions concede that Respondent paid 42.9 days' pay to the unit employees. Doing some mathematics, this figure was apparently reached by dividing the number of hours paid for, 322, by a 7-1/2 hour day.

As can be seen from Appendix D, Respondent asserts that it did pay the employees the full 60 days' pay it promised. It states: ''The calculations were made based upon 35 hours of work each week, for a 7-day period, times the number of weeks covered by 60 days.''

In addition, counsel for the General Counsel reports in Appendix B that Marino and Zimmerman have different recollections of the amount of health insurance promised or paid. Although I had asked for the amount of benefit actually paid for, he did not directly respond. Instead, he said Zimmerman ''believe[s] that unit employees were notified by Respondent that their health insurance would be paid through the end of February 1992 and that for coverage to remain in effect after that time, the employee would have to purchase his own. Marino's recollection, however, was that employees were notified that if they wished to avoid coverage discontinuance as of December 31, 1991, continued and in effect through the end of February 1992, the employee would have to pay premiums for that period.'' Not only do the union officials have differing recollections, they could only recall what Respondent said it would do, not what it eventually did.

I recognize the good-faith effort counsel for the General Counsel has made in attempting to answer my questions and I do not concern myself with his not answering directly. It seems likely that, although the facts may well be undisputed when the records are reviewed, the records were probably not readily available either to him or the two union officials. Insofar as health insurance payments may have some relevance to this decision, that relevance, as will be seen, is slight and of little significance to the result.

Nonetheless, it is quite apparent that Respondent has indeed made a significant payment of postemployment wages to its employees. Whether the amount is the 60 days' tracking the WARN Act, or 42.9 days as contended by the General Counsel and the Unions is not all that important. What is important is whether payment of that amount disables the Board from issuing an effective remedy.

IV. ANALYSIS

Paragraphs 14 and 15 of the consolidated complaint describe the unfair labor practice allegations. First, it asserts that Respondent failed to ''provide [unit employees] their full contractual benefits as they relate to vacation benefits earned.'' Second, it asserts that the shutdown without prior notice deprived the Unions of the opportunity to negotiate and engage in bargaining with regard to the effects the business closure would have on employees being terminated.

The complaint does not accuse Respondent of any other unfair labor practice, either bargaining related or through any kind of active discrimination. It does not even accuse Respondent of bad-faith bargaining at the conference table on January 6, 1992. Therefore, my duty is quite circumscribed. I can only deal with the fact pattern presented in light of the complaint's focus. If I were to reach out and deal with Respondent's behavior elsewhere, i.e., Austin's testimony that Martin said he didn't have bargaining authority or the question of whether that meeting was in good or bad faith, I would be exceeding the scope of the complaint. See, generally, *Castaways Hotel*, 284 NLRB 612 (1987). Accordingly, I direct myself only to the specific allegations there.

First, I think it is quite clear that Respondent presented the Unions with a fait accompli. It had actively misled the Unions during the year or more before the announcement to believe that nothing was amiss. It denied the rumors which had surfaced and said nothing until the moment the sale was finalized and the business shut down. As the Board said recently in *Willamette Tug & Barge Co*., 300 NLRB 282, 282–283 (1990):

> [W]e find a violation in the Respondent's failure to provide any meaningful prior notice to the Union that it was ceasing business and terminating employees. If a seller and a purchaser can be expected to negotiate about, and draft their agreement to provide for satisfaction of, various contingencies such as governmental clearances, so, too, should they be able to account for the human factor—the employees' interest in having their designated representative notified and given an adequate opportunity to bargain about the effects of the sale. That circumstances may compel confidentiality . . . does not obviate the employer's duty to give preimplementation notice to the union to allow time for effects bargaining, provision for which may be negotiated in the sales agreement. We do not presume here to advise corporate negotiators how to accommodate the right of a union to negotiate the effect of the sale on the employees it represents. We merely decide that, barring particularly unusual or emergency circumstances, the union's right to discuss with the employer how the impact of the sale on the employees can be ameliorated must be reckoned with (as must compliance with other governmental requirements) sufficiently before its actual implementation so that the union is not confronted at the bargaining table with a sale that is a fait accompli. Thus, the Union here was entitled to as much notice of the closing and termination of employees as was needed for meaningful bargaining at a meaningful time. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981); *Metropolitan Teletronics*, 279 NLRB 957, 959 fn. 14 (1986), enfd. mem. 819 F.2d 1130 (2d Cir. 1987). We need not decide exactly how many days' notice would be required for such a meaningful opportunity; we find the Respondent's same day notice clearly insufficient. The Respondent therefore violated Section 8(a)(5) and (1) of the Act by closing its operation and discharging the employees without giving the Union adequate notice and

an opportunity to bargain over the effects of its sale of the business. [Fns. omitted.]

Based on the Board's decision in *Willamette Tug & Barge*, it is clear that Respondent's action here likewise violated Section 8(a)(5) and (1) of the Act. Its same day notification of closure is identical to that which occurred in that case. In fact, as in *Willamette*, there is secondary evidence that Respondent even sought prior government approval for the sale; a news report quotes Respondent's publisher as having obtained Justice Department approval under the antitrust laws. See fn. 2, supra. The result therefore must be the same.

I do not, however, find that the General Counsel has proven that the vacation pay matter has merit under Section 8(a)(5). There is only hearsay evidence that employees were shorted unpaid vacation pay. Not a single employee testified about such a shortage. This entire matter is only one of contention, not proof.

The Supreme Court held long ago that a Board order may not be based on uncorroborated or unsubstantiated hearsay. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 230, (1938); also *Carpenters District Council of Sabine Area (Gulf Coast Construction)*, 248 NLRB 802 fn. 2, 806–807 (1980). Since the union officials' testimony and the list of names and claimed hours are both the same hearsay, and since they are not otherwise corroborated or substantiated, nor can they be used to corroborate each other, a Board remedial order cannot be entered. Beyond that, there is no evidence, even assuming Respondent's bookkeeping was incorrect, that it was anything but an error or breach of a contract term warranting scrutiny under the grievance procedure. As the facts show, the policy itself was followed. Only 5 percent of the employees think they were shortchanged.

Even if that hurdle can be ignored, there is no evidence that the Unions ever filed a grievance or demanded Respondent to bargain over the issue. Thus, the Unions have done nothing to force Respondent to reply. Since there has been no request, even though the law requires employers to bargain in good faith over grievances, the duty has not arisen. *Citizens National Bank of Willmar*, 245 NLRB 389, 390 (1979). This allegation must be dismissed for lack of a prima facie case.

THE REMEDY

Because closures of this kind prevent a union from representing its bargaining unit members in any meaningful bargaining, as the company has generally gone out of business and both the union's bargaining strength and its esteem have been undermined, the Board devised the limited backpay remedy described in *Transmarine Navigation Corp*., supra, to try to restore to the union some semblance of bargaining strength and repute. It is an effort to reestablish the circumstances as they would have existed if timely notice of closure had been given.

Normally, that order, conditional in nature, requires the employer to pay full backpay to bargaining unit employees for the period beginning 5 days after the Board issues its order and ending on the earliest of the following possibilities: (1) the date the employer reaches an agreement on effects bargaining, (2) the date a bona fide impasse is reached, (3) on the fifth day if the union fails to request bargaining within the 5 days following entry of the Board's order, and (4) the date the union engages in bad-faith bargaining. The backpay involved is not to exceed the amount the employees would have earned from the employer until they found equivalent employment elsewhere, nor is it ever to be less than what they would have earned for a 2-week period had the employer not shut down.

The *Transmarine* remedy was conceived in circumstances where the employer treats its employees in worse than niggardly fashion. For the most part, this remedy is designed to deal with an employer who wishes to steal away from his employees without so much as a handshake. Respondent, however, does not even begin to fit that pigeonhole. It is true that it carried out its negotiations with the buyer in secret. But it has not said good-bye without a handshake. Instead, it has been unusually generous; it provided what is arguably 60 days' pay, or at least 49.2. Under either calculation that pay far exceeds the minimum which a *Transmarine* order would provide. Therefore, a strong argument can be made that the payments which Respondent made take it out of the *Transmarine* category altogether. Certainly the complete raison d'etre for that remedy is not present here.

There is another factor in play here as well—the consideration that Respondent was operating under the WARN Act. Certainly in its letters of December 8 it said it was giving the 60 days' notice under WARN and although not ''required'' to so under WARN was giving the employees 60 days' pay and benefits. Assuming that inconsistency cannot be reconciled, the WARN Act nonetheless cannot be totally ignored. One section of that act, 29 U.S.C. § 2104(a), provides a civil remedy against employers who fail to give the appropriate 60 days' notice. That remedy is: ''back pay for each day of violation'' at the employee's regular rate of pay including ''benefits,'' as defined. Moreover, subsection (a)(2) specifically provides that the employer's liability under subsection (a)(1) is to be reduced by any wages paid an employee for the period of the violation as well as by the voluntary and unconditional payment of moneys to the employees which are not required by any legal obligation. It is obvious, therefore, that the payments which Respondent made were an effort to avoid a suit under WARN, for its payments were designed to undercut the remedy employees would otherwise have had under that statute.[5]

Under the NLRA, an employer who is found liable for backpay is also permitted an offset for any remedial moneys he has made to unfair labor practice victims. Cf., *Concord Metal*, 298 NLRB 1096, 1097 fn. 3 (1990); *Service Roofing*, 200 NLRB 1015, 1016 (1972). In fact, such an employer is also entitled to an offset of wages earned from interim employment. *F. W. Woolworth Co*., 90 NLRB 289 (1950). Insofar as I am aware, the only payments which would not serve as a credit against backpay are those which qualify as having come from collateral sources, i.e., unemployment compensation[6] and similar third-party payments.[7] It is quite

[5] It is not necessary for purposes of this case to determine whether Respondent's method for calculating 60 days' pay is proper under WARN, but hereafter, for convenience, I shall refer to it as 60 days' pay, even though it is arguably only 42.9.

[6] *Gullett Gin Co. v. NLRB*, 340 U.S. 361 (1951).

[7] See, e.g., *NLRB v. Lundy Packing Co*., 856 F.2d 627 (4th Cir. 1988) (strike benefits not conditioned on providing services a collateral source); *December 12, Inc*., 282 NLRB 475, 477–478

Continued

clear that a direct payment from an employer having wage reimbursement as its purpose cannot be regarded as having come from a collateral source. Indeed, severance pay will serve as an offset to gross backpay. *Sheller-Globe Corp*., 296 NLRB 116, 117 (1989); *W. R. Grace & Co.*, 247 NLRB 698, 699 fn. 5 (1980); *Fibreboard Paper Products Corp*., 180 NLRB 142 (1969), enfd. sub nom. *United Steelworkers v. NLRB*, 436 F.2d 908 (D.C. Cir. 1971). Therefore, it is apparent that the WARN payments, being a type of severance pay, must also serve as an offset to any NLRA backpay award.

Indeed, because any backpay award would be credited with an offset of the 60 days' pay, the only way *Transmarine* would provide a remedy is if bargaining exceeded 60 days without an impasse being reached. A cursory review of the Unions' demands demonstrates that protracted bargaining over those matters is unlikely to occur. Much of what the Unions seek is wishful thinking on its face.

The first three and the last demands seek to piggy-back additional money based on the 60 days' pay. Those demands seem contrived at best. The fifth item, the job retraining fund, is based on a percentage of the purchase price of the newspaper. That kind of figure while having big money and social appeal is totally unrealistic, for the purchase price bears no relationship to available money, the net amount. This company was said to be losing money; presumably it has debts to pay as well as shareholders to reimburse on distribution. It is possible that the purchase price could result in a negative figure for shareholders. The proposal does not begin to address those factors. Frankly, this proposal had no viability from its inception.

The last two items, health insurance and 2 years of life/double indemnity/dismemberment insurance would not have taken up much time—certainly not 60 days; not even the 2-week minimum backpay period. The remaining demand, sick pay, may very well have been the only hope for agreement had it been pursued. Impasse was very much looming as an instant imperative.

I am aware that Austin testified that, in his opinion, impasse had not been reached on January 6. His assessment is probably correct, but only barely so. His testimony about the meeting is most abbreviated. It is hardly the stuff of concrete fact. He certainly has a built-in interest in so testifying, for he well knows that an admission of impasse on his part would kill a *Transmarine* remedy at the outset. I find it curious that he did not describe any effort to call further meetings; I must conclude, therefore, that there was none. Is that because even though he believed impasse had not yet been reached, he knew one was right around the corner; that a second meeting would perfect it? I think so.

The evidence suggests, thin though it may be, that Respondent on January 6, did bargain over the effects of the closure. Moreover, since there is no evidence that additional meetings were sought, it seems likely that the Unions did not pursue further bargaining thereafter. It is therefore quite probable that Respondent has satisfied the *Transmarine* allegation to bargain over effects, or at least that the Unions failed to pursue their obligation to demand further bargaining, inherent in requirement 4, infra. They cannot benefit by their own inaction.

It is clear, therefore, that the 60 days' pay eliminates the need for the *Transmarine* limited backpay remedy. It has already been fully offset and rendered unnecessary. The Board, operating under the Act, cannot provide more than what has been provided. In essence, Respondent recognized its obligation before anyone else did and provided to the employees more than the Board can. Anything in addition ordered by the Board now would simply be a windfall, and windfalls, having no remedial purpose, are outside the scope of the Act. See *Service Roofing*, supra at 1016–1017.

There remains the question of whether this is acceptable under the self-remedying cases such as *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), and its progeny. Yet there are cases in that line which give credit to a respondent who ameliorates its unfair labor practices even though the effort does not meet the strict requirements of *Passavant*. See, for example, *Almet, Inc*., 305 NLRB 626, 629 fn. 14 (1991), a case where a bargaining order was deemed unnecessary because of the employer's good faith, but incomplete, attempt to correct its otherwise serious unfair labor practices. Its effort included voluntarily paying backpay to an unlawfully suspended employee. Thus, despite the strict language of *Passavant*, there appears to be some flexibility in its application, obviously depending on the circumstances. One factor always present in true *Passavant* cases, but not present here, is the intent of the employer to continue to run its business. There, the Board has a strong interest in advising employees of their rights as they continue to work for the employer. Closing the business eliminates that concern. Accordingly, I do not think *Passavant* is an insurmountable hurdle here; this business is closed and the employees do not need anything more to understand that the unfair labor practice has been largely ameliorated and their backpay rights more than satisfied.

Yet, some doubt remains about whether the public interest has been served if the case ends without some recognition that the Act has been violated, even if quickly cured. Although I resolve that concern mainly on practical grounds, the WARN Act comes into play here as well. Two sections of that statute refer to employee rights under other statutes such as the NLRA, 29 U.S.C. § § 2105 and 2108. They are quoted below in the footnote.[8]

The first seems to say that WARN does not change the rights of employees under any other statute. That would on first blush suggest that the remedies under the NLRA are unaffected by it. But it goes on to say that notices under other statutes are to run concurrently with that required by WARN. As we have seen, WARN permits an employer to self-rem-

(1986) (gift of health insurance premiums from mother); *Medline Industries*, 261 NLRB 1329, 1337 (1982) (citing general rule).

[8] They read as follows:

§ 2105. The rights and remedies provided to employees by this chapter are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this chapter shall run concurrently with any period of notification required by contract or by any other statute.

§ 2108. The giving of notice, pursuant to this chapter, if done in good-faith compliance with this chapter, shall not constitute a violation of the National Labor Relations Act [29 U.S.C. § 151 et seq.] or the Railway Labor Act [45 U.S.C. § 151 et seq.].

edy the violation if its notice is insufficient. Does it also, by implication, say that notices required by other statutes can be self-remedied concurrently with the WARN self-remedy? If so, may notices of closure under the NLRA, for effects bargaining purposes also be deemed extended?

The second statute, § 2108, says that if the WARN notices are given in good-faith compliance, the notices cannot be deemed a violation of the NLRA. Here again, we see compliance with the WARN Act, not by timely notice itself, but by a specifically authorized act of self-remedy. As the WARN Act permits good-faith compliance via a self-remedy, does it not also permit the employer, by the same ameliorative behavior, to avoid the NLRA violation which tracks it?

I do not think it is necessary definitively to answer those questions. I point them out, however, to observe that the Congress has considered with some care the plight of employees who find themselves without jobs without notice. It also considered that there may be employers who will nonetheless make employees whole, as this one did, for failing to give that notice, thereby permitting the notice to be skipped, so long as the price for skipping it is paid.

But the Congress seems to have gone beyond that. It was undoubtedly aware of the Board's remedies under the NLRA, including its effort to allow the employee representatives, the unions, to try to gain something for their employees who have been so badly abused, i.e., the *Transmarine* remedy. It also knew that remedy was not as sweeping as the one which it was providing in passing the WARN Act in 1988. Surely, it may be observed, Congress did not intend to provide for two separate remedies for the same misconduct. Finally, why did the Congress permit the self-remedy under WARN if it did not intend that self-remedy to cover closure transgressions under the NLRA as well? Unfortunately, these statutes are on different litigation tracks and I am not authorized directly to analyze WARN,[9] except to the extent moneys paid under it may be considered an offset to backpay concerns under the NLRA. I, therefore decline to do more than to point out these questions. Their very existence demonstrates the responsibility to question the necessity of further proceedings before the Board.

I return now to the practical concerns beyond the fact that no backpay is due. Frankly, some cases, and this is one, simply are not worthy of pursuit. Here, even if an employer representative can now be found to sign it, where would that person effectively post a Board remedial notice? The record, through some correspondence, shows that the buildings are no longer owned by Respondent. Therefore, there is no place to post one. Even if posted, or possibly mailed to former employees, what could it add to what they have already received, the 60 days' pay? The notice would be, to some extent, futile and might even be regarded as foolish—too little, too late—barren even of a realistic attempt at remedying anything.

I must confess that I reach the above conclusion reluctantly. I strongly believe in the importance of educating employees and the public about their rights under the Act. Remedial notices play an important role in that process. At the same time, I think I know when a sport case such as this requires the exercise of common sense. Common sense presses the Board to quit now. There is no more blood, private or public, to be squeezed from this turnip.

Thus, this is not simply a case which can push the remedial concerns to the compliance stage. It is really a question of whether any remedy at all can be found to fit the circumstances. Since one cannot, I conclude that the case should end here.

I am, nonetheless, obligated to make, based on the foregoing findings of fact, the following

CONCLUSIONS OF LAW

1. The Respondent, Times Herald Printing Company d/b/a Dallas Times Herald, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Both Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. By closing its business and terminating its employees who were represented by the Unions without giving them a reasonable opportunity to bargain over the effects such loss of employment would have on its employees, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

4. By paying to its employees pay and benefits for 60 days immediately on their termination Respondent rendered it unnecessary for the Board to provide any additional remedy for that unfair labor practice.

[Recommended Order for dismissal omitted from publication.]

APPENDIX A

United States Government
National Labor Relations Board
Division of Administrative Law Judges
901 Market Street - Suite 300
San Francisco, CA 94103-1779

August 14, 1992

J. O. Dodson, Attorney
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102-6178

Billy J. Austin, Vice-President
Communications Workers of America
8085 East Prentice Avenue
Englewood, CO 80111

Re: Times Herald Printing Co. dba Dallas Times Herald
Cases 16–CA–15433, 15433–2

Gentlemen:

I have been reviewing the record in the above matter which I heard on June 11, 1992, as well as my notes from the conference call which preceded it. I believe certain apparently undisputed factual material, relevant to the decision in this case, did not find its way into that record, undoubtedly by oversight.

Accordingly, please promptly advise me of the following:

[9] I am, of course, obliged to consider the impact other statutes have on the Board's administration of the Act. As the Board said in *Meyers Industries*, 281 NLRB 882, 888 (1986):

> [I]t is our duty to construe the labor laws so as to accommodate the purposes of other Federal laws (see, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892–894 (1984); *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) . . . .

1. a. Whether you acknowledge, as Mr. Martin advised both in his answer and in the conference call, that Respondent has in fact paid the 60 days pay and benefits which Respondent announced in its letters of December 8, 1992 [G.C. Exhs. 9 and 20]. b. The date(s) when these payment(s) were made, if known. c. What ''benefits'' were covered, e.g., health insurance.
2. The number of employees in the Typographers (printers) bargaining unit, a fact which Ms. Marino could have supplied.

Item 1, of course, is referenced in the Unions' January 6 demands (G.C. Exhs. 14 and 22). Please advise me in writing of these matters as soon as possible.

Thank you.

Very truly yours,
/s/ James M. Kennedy
Administrative Law Judge

cc: Neil Martin, Esq.
Fulbright & Jaworski
1301 McKinney, Suite 5100
Houston, TX 77010-3095

Richard Rosenblatt, Esq.
Sector Counsel
Communications Workers of America
8085 E. Prentice Avenue
Englewood, CO 80111

APPENDIX B

United States Government
National Labor Relations Board
Region 16
819 Taylor Street-Room 8A24
Fort Worth, TX 76102-6178

August 20, 1992
Telephone:
(817) 334–2947

Honorable James M. Kennedy
Administrative Law Judge
Division of Administrative Law Judges
National Labor Relations Board
901 Market St., #300
San Francisco, CA 94103-1779

Re: Times Herald Printing Company
d/b/a Dallas Times Herald
Case Nos. 16–CA–15433 and 15433–2

Dear Judge Kennedy:

This is in response to your letter of inquiry of August 14, 1992.

I am advised by Ms. Marino that at the time of the cessation of operations of the newspaper, there were 53 Times Herald employees in the typographers (printers) bargaining unit.

As to your question relative to WARN, neither General Counsel nor the Charging Parties acknowledge or agree that Respondent paid employees 60 days pay and benefits. Rather, General Counsel has been advised by Local Presidents Zimmerman and Marino that unit employees in each bargaining unit were paid 42.9 days (322 hours). Ms. Marino advises that to the best of her knowledge, the employees' checks for the 42.9 days were issued December 29, 1991. To the best of her knowledge, the employees' payments included vacation pay (with the exception of those individuals named in the transcript and G.C. Exhibit 18). To the best of Ms. Marino's knowledge, the 2% employer contribution to the pension plan in both units was not made for those days.

With regard to health insurance, Mr. Zimmerman believed that unit employees were notified by Respondent that their health insurance would be paid through the end of February, 1992 and that for coverage to remain in effect after that time, the employee would have to purchase his own. Ms. Marino's recollection, however, was that employees were notified that if they wished to avoid coverage discontinuance as of December 31, 1991, continued and in effect through the end of February 1992, the employee would have to pay the premiums for that period.

Attorney Richard Rosenblatt of the Communications Workers of America is also checking his records and those available to him relative to your request and in the event he has additional information, I will immediately forward it to you upon receipt.

The one thing of which there appears to be no doubt is that all employees in both units received only 42.9 days pay as opposed to the 60 days pay required under WARN. Consequently, it is General Counsel's position that the WARN Act should in no way act as an offset to General Counsel's requested *Transmarine* remedy.

Sincerely,

/s/ J. O. Dodson
J. O. Dodson
Counsel for the General Counsel

cc: Richard Rosenblatt, Attorney
Sector Counsel, CWA
8085 E. Prentice Ave.
Englewood, CO 80111

Neil Martin, Attorney
Fulbright & Jaworski
1301 McKinney, #5100
Houston, TX 77010-3095

Billy J. Austin, Vice Pres.
Communications Workers of America
8085 E. Prentice Ave.
Englewood, CO 80111

JOD/jgo

APPENDIX C

Communications Workers of America, AFL–CIO
Printing, Publishing and Media Workers Sector
Office of
Richard Rosenblatt
Sector Counsel

August 24, 1992

James M. Kennedy, Administrative Law Judge
National Labor Relations Board
Division of Administrative Law Judges
901 Market Street - Suite 300
San Francisco, CA 94103-1779

RE: Times Herald Printing Co. dba Dallas Times Herald Cases 16–CA–15433, 15433–2

Dear Judge Kennedy:

Charging Parties (represented at the hearing by Billy J. Austin), respond to the questions in your August 14 letter as follows:

We agree with the content of Mr. Dodson's August 20 letter to you. The 42.9 days of payments were made pursuant to the recently-enacted WARN Act. Under that Act, the Employer was statutorily obligated to provide 60 days notice prior to closure. In lieu of any notice, the Employer made this payment. Nothing in either the WARN Act or the NLRA states, or even remotely suggests that payments to the WARN Act relieve the Employer of its statutory obligation to bargain under the NLRA to provide notice to the Union and bargain over the effects of the closure.

Nor does any portion of the WARN Act or NLRA state or, even remotely suggest, that payment made pursuant to the WARN Act obviate the need to provide a *Transmarine* remedy pursuant to the NLRA.

Respectfully submitted,

/s/ Richard Rosenblatt
Richard Rosenblatt

RR:snt opeiu5 afl-cio

xc: Jim Dodson, NLRB, Region 6
B. J. Austin, V.P., PPMWS/CWA
Neil Martin, Esq.
Suzye Gardner-Marino, Pres., Local 173
John Zimmerman, Local 173

APPENDIX D

FULBRIGHT & JAWORSKI

1301 McKinney, Suite 5100
Houston, Texas 77010-3095

August 26, 1992

Re:Dallas Times Herald Printing Company
d/b/a Dallas Times Herald—NLRB
Case Nos. 16–CA–1543S and 15433–2

The Honorable James M. Kennedy
Administrative Law Judge
Division of Administrative Law Judges
National Labor Relations Board
901 Market Street–Suite 300
San Francisco, California 94103-1779

Dear Judge Kennedy:

This letter is in response to your correspondence of inquiry dated August 14, 1992.

Please be advised that although the Dallas Times Herald, Respondent herein, was under no obligation under the Worker Adjustment and Retraining Notification Act to provide compensation to its employees, it paid wages and beneits for 60 days to employees within the Typographical and Mailers bargaining units. The calculations were made based upon 35 hours of work each week, for a 7-day period, times the number of weeks covered by 60 days. These employees received the compensation they would have received had they been given 60 days notice prior to the Newspaper's termination of operations.

All of the employees in the bargaining units affected by the above-captioned charge received vacation pay for the 60 days covered by the WARN payments. The Newspaper researched all disputed claims for vacation pay and either prepared additional sums for employees who were underpaid or provided documentation why employees' claims were inaccurate.

Health insurance benefits for the employees within the bargaining unit were paid during the 60-day WARN notice period. The normal employee co-payments were not required for the period from February 9 to February 29, 1992, although, under normal circumstances, a co-payment would have been required.

A profit-sharing payment was made for all the employees within the bargaining unit, although not required by WARN, since the Newspaper was a ''faltering company,'' within the meaning of WARN.

If we may be of further assistance to you in connection with your review of this matter, please do not hesitate to contact the undersigned.

Very truly yours,

/s/ Neil Martin
Neil Martin

NM/tf/145731

cc: Mr. J. O. Dodson
Counsel for the General Counsel
National Labor Relations Board
Region 16
819 Taylor Street - Room 8A24
Fort Worth, Texas 76102-6178

cc: Mr. Richard Rosenblatt
Sector Counsel
Communications Workers of America
8085 East Prentice Avenue
Englewood, Colorado 80111

cc: Mr. Billy J. Austin
Vice President
Communications Workers of America
8085 East Prentice Avenue
Englewood, Colorado 80111